

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-012696

03/24/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

SHIDAN DAHNAD

JEFFREY J TONNER

v.

STATE OF ARIZONA BOARD OF DENTAL
EXAMINE

MARY WILLIAMS

REMAND DESK CV-CCC

MINUTE ENTRY

Standard of Review

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.¹ The reviewing court may not substitute its own discretion for that

¹ *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980); *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977);

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exercised by an administrative agency,² but must only determine if there is any competent evidence to sustain the decision.³

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings and the Memoranda submitted.

Background

This matter arises out of a complaint filed with the Board by A.H. in September 2001. In August 2001, Dr. Dahnad hired A.H. as a front office clerk. Dr. Dahnad told his staff that the nitrous oxide machine was not working properly, and he asked his dental assistant if he could test the machine on her. She declined, stating that nitrous oxide gives her headaches. A.H. was asked next and she accepted. She was placed under the nitrous oxide.

A.H. reported to the Board that the Plaintiff, while alone with her in his dental office, placed her under nitrous oxide, which was not in conjunction with any dental treatment and acted inappropriately towards her while she was under the influence of the drug (i.e., kissing her, rubbing her back, holding her hand, making inappropriate comments and looking down her shirt). This occurred on the day that Plaintiff offered A.H. a position as his receptionist. Plaintiff seeks judicial review of the Board's Order revoking his dental license.

The Plaintiff raises three issues for review. The first issue is whether the Board's repeated references to prior accusations during the revocation hearing tainted the process so as to deny Plaintiff a fair hearing. The second is whether the Board's findings of fact and conclusions of law tainted the process as to deny Plaintiff a fair hearing. The third issue is whether revocation is proper, where the physical evidence shows that A.H.'s story is impossible.

Discussion

This court must repeat that the standard of review of administrative decisions is limited to deciding whether the administrative agency action is supported by substantial evidence, is contrary to law, is arbitrary, capricious, or an abuse of discretion.⁴ Since the Plaintiff has not phrased his request as such, this Court will only address those issues that determine whether the revocation of the Plaintiff's dental license is supported by substantial evidence is not contrary to law, arbitrary, capricious or an abuse of discretion.

The State charged the Plaintiff with the following acts of unprofessional conduct: (1) administering nitrous oxide, a drug, to A.H. who was not a patient and not in connection with

² *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

³ *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz. App. 432, 484 P.2d 201 (1971).

⁴ A.R.S. § 12-910(E).

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any dental treatment, conduct that is a violation of A.R.S. § 32-1201(18)(c) and § 32-1201(18)(n); and (2) while A.H. was under the effects of nitrous oxide, rubbing A.H.'s back, holding her hand, kissing her, looking down her shirt and making inappropriate comments to her, conduct that is in violation of A.R.S. § 32-1201(18)(n).

The Plaintiff does not dispute that he placed A.H. under nitrous oxide, but argues that the machine was exhibiting defects and needed to be tested before the open of the next business day. He further adds that he had tested the machine out on a staff member in the past and she "denies any inappropriate advances despite her vulnerable condition."⁵ Additionally, Plaintiff argues that the events that A.H. described is impossible to have occurred because three facts about the physical evidence supports his position. The first fact, according to the Plaintiff is that the kiss on the nose that A.H. testified to was impossible. Plaintiff asserts that the nitrous oxide mask placed on A.H.'s face during the hearing demonstrates that was impossible to kiss A.H. on the nose. Moreover, Plaintiff adds that A.H. spoke to Channel 3 news after the incident initially occurred and she indicated that the Plaintiff had indeed kissed her on the nose. Second, the Plaintiff argues that he could not have kissed the witness on the lips. Plaintiff claims that this never occurred and was another impossibility. He argues that the nose piece touched the witness' upper lip and as such it was impossible to kiss A.H.'s upper lip without moving the nose piece. Third, the Plaintiff argues that after the incident A.H. stayed in the office for a length of time. And A.H. could have left the office immediately after the incident since her car was parked in the parking lot, which was at her disposal. However, A.H. voluntarily stayed at the office and completed clerical work, she assisted the Plaintiff in taking some personal items to his car, and A.H. chatted with Plaintiff before she left the premises, all actions indicating that nothing improper had occurred.

The role of this Court is to determine whether substantial evidence exists to support the Board's findings that the Plaintiff engaged in unprofessional conduct. Despite the Plaintiff's request to do so, this the court can not reweigh both the physical evidence and the findings of credibility by the ALJ. Where factual questions and agency expertise are involved, this Court may not function as a superagency and substitute its judgment for that of the agency.⁶ The ALJ considered the testimony of both A.H. and the Plaintiff as well as the physical evidence and concluded that A.H.'s credibility is found to be more persuasive than that of the Plaintiff.

The ALJ found that the Plaintiff "...had not demonstrated that it would have been impossible for him to have kissed the complainant while she was wearing the nose piece".⁷ The Plaintiff admitted at the hearing that the nose piece did not cover the bottom lip, the chin, or the cheeks. Given that the Plaintiff requested that A.H. put on a standard size nose piece, there was no evidence that would lead one to the conclusion that it was impossible for Plaintiff to have kissed A.H. across the lips and the chin, as she testified that he did. Plaintiff's argument that A.H.

⁵ Plaintiff's Opening Brief, p. 19, ln. 2.

⁶ Degroot v. Arizona Racing Comm'n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).

⁷ AR, TR 10/30/01, p. 152, lin. 23 to p. 154 ln. 4.

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did not flee the office once the incident occurred, was found by the ALJ to not warrant a conclusion that A.H.'s testimony without credibility. The ALJ heard from the witness's mother, who is a licensed hygienist and who spoke with A.H. immediately after the incident and testified that her daughter was very upset when she told her what happened.

While the Plaintiff posits the theory that A.H. simply had a "sexual hallucination" the ALJ considered that theory along with the testimony of Dr. Edmunds and found that the "evidence regarding the nitrous oxide hallucinations did not show it more likely than not that A.H. hallucinated; that she merely thought that [Plaintiff] was making or had made sexual advances toward her."⁸ This court finds this claim to be ludicrous.

As for the second issue that the Plaintiff placed A.H. under nitrous oxide, the Plaintiff does not dispute this claim. However, he argues that there is independent proof that his nitrous machine showed some sign of defect and needed to be tested. According to Plaintiff, his patients had complained that the sedation levels were not effective and introduced his technician's log. Plaintiff further asserts that the machine had to be tested because a minor boy was scheduled the next business day for nitrous use. Since the office would be closed during the long holiday weekend, the Plaintiff thought it was most convenient time to test the machine. Plaintiff's assistant Gina Moreno had tested the machine in a previous year, but declined to do so because the nitrous oxide gave her headaches. This left only A.H. as the only remaining employee.

Under A.R.S. Section 32-1201(18)(c) it states that it is unprofessional conduct to dispense or use drugs other than for accepted dental therapeutic purposes or for other than medically indicated supportive therapy in conjunction with managing a patient's dental needs. A.R.S. Section (18)(n) states that any conduct or practice that constitutes a danger to the health, welfare or safety of the patient or the public is unprofessional.

Here, A.H. was not a patient. Plaintiff admits to that. She was his newly hired receptionist. The use of the nitrous oxide on A.H. was not for accepted dental therapeutic purposes or dental needs. Moreover, the Plaintiff has not argued that he did not misuse nitrous oxide.

The Board found that using nitrous oxide on an employee constituted a danger to the health, welfare or safety to the public. Plaintiff did not conduct a medical history on A.H. Plaintiff's own expert witness, along with B.H. and Dr. Pozil testified that a dentist should be aware of a patient's past and present medical condition, particularly before dispensing a drug. Despite Plaintiff's testimony that he has tested the machine out on a former dental assistant, this does not justify what he did to A.H. Plaintiff's expert witness, Dr. Edmunds, along with the State's witnesses, all testified that a dentist should have nitrous oxide equipment tested by a professional if a problem is suspected. Furthermore, Plaintiff offered no evidence that it is acceptable practice to test nitrous oxide on a person to see if the equipment is functioning

⁸ ASBDE, Answering Brief, p. 18, lns. 9-12; (quoting the ALJ, AR, Doc. 2, p. 14 ¶ 13, footnote 36).

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properly. Apparently, the Plaintiff was aware of another method that he could have used to test his equipment. During the hearing the ALJ heard testimony from him that he had learned to test his nitrous oxide equipment lines with soap and water solution from a technician and a seminar he took.⁹

The Board's finding that the Plaintiff violated A.R.S. §§ 32-1201(18)(c) and (n) by administering nitrous oxide to A.H. are supported by Plaintiff's own testimony and admissions as well as the testimony of his expert witness and the Department's witnesses.

Plaintiff also claims error in the Board's consideration of evidence that four of his patients had made previous similar allegations of improper sexual contact while in the dental chair. However, Plaintiff offered this evidence during his testimony. Plaintiff offered this testimony to show that allegations of sexual misconduct could be imagined or "hallucinated", and to address his probationary status with the Board. Such a contention strains the bounds of credibility, but Plaintiff has waived any error in the admission of this evidence.

It is clear that the Board's decision is not contrary to law, arbitrary, capricious or an abuse of discretion.

IT IS THEREFORE ORDERED affirming the administrative decision of the Arizona State Board of Dental Examiners.

IT IS FURTHER ORDERED denying all relief requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED that counsel for the Defendant prepare an application for attorney's fees and costs incurred in defending this administrative appeal, and lodge the same with this court, with an order consistent with this opinion, and containing provision for fees and costs.

⁹ Defendant's Answering Brief, p.10, ln. 19-25.